IN THE CORPORATION COURT OF THE CITY OF ALEXANDRIA, VIRGINIA.

CHARLES L. HAWKINS, ADMR. *v.* SOUTHERN RAILWAY COMPANY.

1. **Railroads—Statutes—Federal Safety Appliance Acts.**—The acts of congress known as the Federal Safety Appliance Acts are remedial statutes, in so far as they intend to promote the public welfare by procuring the safety of employees and travelers.

2. **Railroads—Death by Wrongful Act—Federal and State Statutes—Conflict of Jurisdiction.**—The laws of the United States are laws of the several states, and binding on the citizens and courts thereof, and the legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty, competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction.

3. **Federal Statutes—Enforcement in State Courts.**—If an act of congress gives a penalty to the party aggrieved, without specifying the remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of congress, by a proper action in the state court.

4. **Interstate Commerce—Exclusive Power of Congress.**—Congress being authorized to legislate with respect to all subjects of interstate commerce, this power necessarily involves the right to declare the liability which shall follow the infraction of regulations prescribed by Congress, and whatever, therefore, Congress determines, either as to a regulation, or the liability for its infringement, is exclusive of state authority.

5. **Interstate Commerce—Death by Wrongful Act—Regulation of Carrier's Liability.**—Congress has undertaken to regulate and has regulated touching the liability of carriers by railroads for interstate commerce torts by such carriers resulting in the death of the person injured so far as employees of such carriers are concerned, therefore such regulation must be exclusive of state authority, and such regulation must govern in the consideration of the demurrer to the declaration in this suit. Secs 2902-6 of the court of Virginia cannot apply to the fifth and sixth counts of the declaration, but the act of congress must govern.

6. **Death by Wrongful Act—Interstate Commerce—Demurrer to Declaration.**—The fifth and sixth counts of the declaration charging liability upon the defendant under the United States statutes, standing alone, would allege a liability upon the defendant in favor of the plaintiff, and the demurrer to those two counts, if in a separate action, should be overruled, but the general demurrer to the declaration should be sustained because of misjoinder and the plaintiff be given leave to amend his declaration by electing under which remedy he will proceed, whether under the first four counts based upon

the state law or under the last two based upon the United States statutes and striking from the declaration those counts upon which he does not elect to proceed. Suit remanded to rules with leave to amend the declaration.

Action of Assumpsit. Demurrer to the Declaration.

LOUIS C. BARLEY, Judge. The first four counts of the declaration are laid on certain alleged breaches of duty by the defendant to the plaintiff's intestate under the State law of Virginia, while the fifth and sixth counts are based solelv upon what is known as the Safety Appliance Acts passed by the Congress of the United States, known as Public No. 113, approved March 2nd, 1893, amended April 1st, 1896, and a certain other act known as Public No. 133, approved March 2nd, 1903.

The fifth count is based upon the first of said Acts as amended, and especially on the first, second and eighth sections thereof, which read as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power-driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

"Sec. 6. (As amended April 1, 1896). That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: Provided, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car

from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

"Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

This count of the declaration charges a non-compliance with the provisions of this Act, on account of which the injury occurred.

The sixth count is based upon the other of said Acts, and especially Section 2, which reads as follows:

"Sec. 2. That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

This count of the declaration charges a non-compliance with the provisions of this act, on account of which the injury occurred.

Briefly the facts as set forth in the last two counts of the declaration are, that the plaintiff's intestate was a brakeman on the defendant's railway and as such was in the necessary discharge of his duty upon the roof of one of the cars of its train; that the defendant at the time was a common carrier of passengers and freight for hire engaged in interstate commerce by railroad and operating its train of cars and locomotive engines in moving interstate traffic over Union Street in the City of Alexandria, Virginia; that at the time of the accident, July 22nd, 1908, the plaintiff's intestate as such brakeman was engaged in shifting a train of freight cars with a locomotive engine attached thereto moving interstate traffic; and that while said train was being shifted as aforesaid, it was stopped with such unusual force and violence that the plaintiff's intestate was jarred from

his position as aforesaid and thrown off the car, fracturing his skull and otherwise injuring him, from which injuries he died.

The defendant demurred to the declaration and to each count thereof and for ground of demurrer, as to the last two counts, stated that neither of them impose or create any liability upon the defendant in favor of the plaintiff.

The questions raised by the demurrer to these last two counts are indeed interesting and novel and almost entirely questions of first impression in this country.

The first question raised by the demurrer is "Whether Sections 2902-6 of the Code of Virginia give to the personal representative of the deceased a right of action because of a non-compliance with the provisions of said Statutes of the United States."

Right here it should be borne in mind that under the ruling laid down in the cases of Anderson *v.* Hygeia Hotel Co., 92 Va. 687 and Beavers Admx. *v.* Putnam's Curator, 110 Va. 713, Sections 2902-6 of the Code of Virginia give to the personal representative a new and original right of action for the benefit of the persons named therein and in no way causes the right of action, which the intestate may have had for the injury, in his lifetime, to survive to his personal representative, but it, being a personal action, died with him.

Looking first to the character of these acts to ascertain whether these Acts of Congress are penal or remedial statutes, we find that if they are strictly penal statutes, the demurrer must be sustained.

The preambles of the two acts are as follows:

Preamble to 1st Act, "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

Preamble to 2nd Act, "An Act to amend an act entitled 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six."

The Safety Appliance Acts have been twice before the Supreme Court of the United States, first in the case of Johnson *v.* Southern Pacific Co., 196 U. S. 17, second in the case of St. Louis I. M. & S. R. Co. *v.* Taylor, 210 U. S. 281. The said Acts and the liability arising from non-compliance therewith are fully discussed in these decisions. I will quote from the

opinion of the late Mr. Chief Justice Fuller, in the first of the above cases,

"The primary object of the act was to promote the public welfare by securing the safety of employees and travelers; and it was in that aspect remedial; while for violations a penalty of $100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs—that rule not requiring absolute strictness of construction.

Mr. Justice Moody, delivering the opinion of the court in the other case (p. 294) said,

"In deciding the questions thus raised, upon which the courts have differed, we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described."

Under these rulings the court must, therefore, consider the acts so far as they intend to promote the public welfare by securing the safety of employees and travelers, as remedial.

Having thus ascertained the character of the statutes in question to be remedial, so far as these counts are concerned, it is necessary for the court to examine briefly into the reciprocal relation of the government of the several states and that of the United States and the respective laws of the one to the other, in order to ascertain the law applicable to the case at bar.

Every state of the Union is a sovereignty and supreme within its jurisdiction and boundaries, except in so far as they may have voluntarily surrendered their power to the United States Government, as set forth in the Constitution of the United States, and the amendments thereto and the laws enacted thereunder, but within the limitations set forth therein the Federal Government is supreme.

Article 6 Sec. 2 of the Constitution of the United States is as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States,

shall be the supreme law of the land; *and the judges in every state shall be bound thereby,* anything in the constitution of laws of any state to the contrary notwithstanding."

A very interesting discussion of this subject will be found in the Federalist Chap. 82. Mr. Hamilton in his argument said:

"Agreeably to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter will, of course, be natural auxiliaries to the execution of the laws of the Union."

Discussing the relation which the laws of the one bear to the other, the late Mr. Justice Bradley, in delivering the opinion of the court in Claflin *v.* Houseman, 93 U. S. 130-143 said:

"When we consider the structure and true relations of the Federal and State Governments, there is really no just foundation for excluding the State Courts from all such jurisdiction."

"The laws of the United States are laws of the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the State; concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws, may be prosecuted in the State Courts, and also, if the parties reside in different States, in the Federal Courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts, or in the State Courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal Courts exclusive jurisdiction. See remarks of Mr. Justice Field, in The Moses Taylor, 4 Wall. 429, and Story, J., in Martin *v.* Hunter, 1 Wheat. 334; and Mr. Justice Swayne, in Ex parte McNeil, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an Act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some Act of Congress, by a proper action in a State Court. The fact that a State Court derives its existence and functions from the state law is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much

bound to recognize these as operative within the State as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

"It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of Ableman *v.* Booth, 21 How. 506; and hence the State Courts have no power to revise the action of the Federal Courts nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State Courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

The principle is thus laid down, that the laws of the United States are laws of the several states, and just as much binding on the citizens and courts thereof as the state laws are; every citizen of a state is a subject of two distinct sovereignties having concurrent jurisdiction in the state, concurrent as to place and persons, though distinct as to subject matter; and legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction; if an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The state laws and the laws of the United States together from one system of jurisprudence, which constitutes the law of the land for the state, and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country having jurisdiction partly different and partly concurrent.

Thus it is shown that the laws of the state and the laws of the United States must be read together and together they form the law of the state, sometimes to be administered exclusively in the state courts, sometimes exclusively in the United States courts and at other times in either of said courts according as the constitutions of the state and the United States, and the laws thereunder, provide; bearing in mind that in case of conflict the constitution and laws of the state give way to those of the Federal Government, if the laws of the latter are made in pursuance of its constitution. If there is no conflict, however, then the two

sets of laws, read together, control. Whether there is such a conflict is frequently a matter for most careful inquiry.

Art. 1 Sec. 8, Clause 3 of the Constitution of the United States reads:

"The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

The Constitution of the United States, under this provision, has given Congress power to enact certain laws, but until Congress does enact laws thereunder, the state laws govern and constitute no encroachment upon the commercial power of Congress. The decisions go even further in upholding the state laws, for even though Congress may have legislated in respect to part of its power thereunder, yet if it has not legislated with respect to the matter in question, and the matter in question cannot be held to have fairly fallen within the purview of the subjects legislated upon, there is no conflict and the state laws apply. If, however, it had undertaken to legislate in connection with the matter in hand, it must be considered as having fully done so, and such legislation would govern even in conflict with state laws.

Sherlock *v.* Allen, 93 U. S. 99 is a case where the personal representative brought suit for the death of his intestate caused by a marine tort on the Ohio River within the State of Indiana. The complainant charged that the collision occurred owing to the careless and negligent navigation of the steamboat "United States," by the defendant's servants, and the officers of the vessel, but especially to the carelessness of the pilot, in running the same at too great a speed down the stream, in giving the first signal to the approaching boat, as to the choice of sides of the river contrary to the established custom of pilots navigating the Ohio, and the rules prescribed by the act of Congress, and in not slackening the speed of the boat and giving a signal of alarm and danger until it was too late to avoid the collision. The late Mr. Justice Field in delivering the opinion of the court said:

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital and other dues they shall be subjected; what rules they shall obey in passing each other; and what pro-

vision their owners shall make for the health, safety and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

"The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. *Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority.* But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the Statute of Indiana falls under this class. *Until Congress, therefore makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the Statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased,* and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress. U. S. *v.* Bevans, 3 Wheat. 337."

From the last constitutional provision quoted and from the quotation from this decision it will be seen that Congress was authorized to legislate with respect to all subjects of interstate commerce, the persons engaged in it and the instruments by which it is to be carried on; that Congress had legislated, so far as marine interstate commerce was concerned, largely with the instruments of that commerce, but had not undertaken to legislate with respect to persons engaged in it. This decision says that the power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction, and that whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, *is exclusive of state authority.* With reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the

state govern, and until Congress makes some regulation touching the liabilities of such parties for torts resulting in death of the persons injured, the laws of the state will govern, but no longer. This, I think, is the law of this case. Has Congress then undertaken to regulate touching the liability of carriers by railroad for interstate commerce torts by such carriers resulting in the death of the injured person? If it has not, then the state law applies and the rule of law given therein will govern until such regulation is made if it has, then such regulation *will be exclusive of state authority* and must be followed.

In connection with the Safety Appliance Acts of Congress under consideration let us examine another act of Congress, supplemental, as to remedy, to the statutes in question, although enacted sometime thereafter. The statute referred to is the one known as the "Employees' Liability Statute" approved April 22nd, 1908, and in force at the time the injury complained of was sustained by the plaintiff's intestate, the preamble to which reads,

"An act relating to the liability of common carriers by railroad to their employees in certain cases."

This statute changed the common-law doctrine of master and servant and makes the carrier responsible for injury to the employee engaged in interstate commerce and for death resulting from such injury in certain cases, and gives to the personal representative of the employee, within the limitations set forth therein, a right of action for the benefit of the persons named. The first section of this statute reads as follows:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several states or Territories, or between any of the States and Territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependen upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In the case of Fulgham *v.* Midland Valley R. Co. 167 Fed. 660 (U. S. Circuit Court Western District of Arkansas) the employee's liability statute of April 22nd, 1906, from which Sec-

tion 1, immediately above, is quoted, was before the court. The questions discussed and decided in this case arose upon an argument based upon two motions, the one to strike out certain portions of the complaint which looked to the recovery of damages by the plaintiff as administrator of the estate of E. C. Pogue, deceased, for the benefit of said estate, growing out of pain and suffering and loss of time and expenses incurred by the deceased before his death; and in the other motion it was insisted that the complaint contained in one count two separate and distinct causes of action and defendant moved the court to require plaintiff to elect whether he would stand upon the cause of action which related to damages for the benefit of the widow and children of the deceased, or whether he would stand on the cause of action looking to the recovery of damages for pain and suffering and loss of time and expenses incurred by the deceased before his death. In discussing the case, Judge Rogers, delivering the opinion of the court said,

"It is apparent that these two separate and distinct causes of action are modeled upon the legislation of the State of Arkansas (Kirby's Digest, Secs. 6285-6290), which were interpreted in the case of Davis *v.* Railway, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. In that case one cause of action was given under section 6285, and the other under sections 6289 and 6290. The former was for the benefit of the estate; and the latter for the benefit of the widow and next of kin. Section 6285 expressly provides for the survival of the right of action for the injury in case of death as the result therefrom, and vests the right of action in the personal representatives of the deceased, for the benefit of his estate. The other two sections give a right of action for a death caused by negligence, and also vests the right of action in the personal representatives of the deceased for the benefit of the widow and children. The court in Davis *v.* Railway, *supra*, held that the statutes creating these two causes of action were not in conflict, were in their nature separate and distinct, and both vested in the personal representative.

"What of the federal statute quoted above? First, can plaintiff avail himself of the Arkansas statutes in this character of case for any purpose? It is admitted the suit was brought under the federal statute quoted. It could not have been brought in this court had it not been, for the citizenship of the parties is the same. The authority for enacting the statute must be found in the interstate commerce clause of the federal Constitution (Const. art. 1, sec. 8, cl. 3). The very terms of the act are conclusive of that, and it is not controverted. A reference to the whole act clearly shows Congress undertook to regulate the relations of employers and employees engaged in interstate commerce by railroad."

"It is clear that the act of April 22nd, 1908, *supra*, superseded, and took the place of all state statutes regulating relations of employers and employees engaged in interstate commerce by railroads. It covered not only injuries sustained by employees engaged in that commerce resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making in certain cases, at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive. All state legislation on that subject must give way before that act. Missouri Railroad Commission *v.* Illinois Cent. R. R. Company, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; Sherlock et al. *v.* Alling, Administrator, 93 U. S. 104, 23 L. Ed. 819. These last cases serve to show that, until Congress has acted with reference to the regulation of interstate commerce, state statutes regulating the relations of master and servant and incidentally affecting interstate commerce, but not regulating or obstructing it, may be given effect; but when Congress has acted upon a given subject, state legislation must yield. In Gulf Colorado, etc., Railroad Co. *v.* Hefley, 158 U. S. 99, 15 Sup. Ct. 804, 39 L. Ed. 910, the court said:

"When a state statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerning it, the state statute must give way."

The court then holds that the said statute of the United States makes no provision for the survival of that action, so given, for an injury sustained, in the event of the death of the injured employee, although the Arkansas statute under said Section 6285 thereof did make such provision and that the motions should be granted because the United States statute applied and superseded the state statute, Congress never contemplating a survival of the action given to the injured employee, but only intending to give to the personal representative a right of action for the widow and children, etc., as set forth in said statute.

In the case of Walsh *v.* N. Y., N. H. & H. R. Co., 173 Fed. 494 (Circuit Court for the District of Mass.), the same point was sustained.

The Employee's Liability Act, quoted just above, stripped of much of the language, and so far as applicable here, provides:

"That every common carrier by railroad while engaging in commerce between any of the several states, etc., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such

employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

Surely the meaning is clear and unambiguous; unquestionably, therefore, Congress has undertaken to and has regulated touching the liability of carriers by railroad for interstate commerce torts by such carriers resulting in the death of the person injured so far as employees of such carriers are concerned, therefore such regulation *must be exclusive of state authority and such regulation must govern* in the consideration of the demurrer to the declaration in this suit. Sections 2902-6 of the Code of Virginia cannot apply to the 5th and 6th counts of the declaration, but the act of Congress must govern. It is to be noted that under the act of Congress, the remedy given to the employee is only against a common carrier by railroad engaged in interstate commerce, while the remedy under Sections 2902-6 of the Code of Virginia is to the personal representative of anyone who feels himself aggrieved by reason of the wrongful act, neglect or default of any person or corporation. This anomalous situation is presented. Whenever a tort has occurred and injury has resulted to an employee of a carrier by railroad, from which death ensues, if the tort can be said to have occurred partly in violation of the state laws and partly of the U. S. Statutes regulating interstate commerce, as is the case presented by this declaration, the first four counts being based on the state law and the last two on the U. S. Statutes, two remedies are given for the same cause of action, one emanating from and subject in all particulars to the state laws and the other the U. S. Statutes. The remedies under the two laws are entirely different; for instance, under the state laws where death has ensued the personal representative is limited in the amount of his action to $10,000, while under the U. S. Statute there is no limitation; again under the state law he is limited in point of time in bringing his action to one year, while under the U. S. Statute he is limited to two years; again under the state laws if there is no wife, husband and child, the recovery, may, in the discretion of the jury, be distributed among the parents, brothers and sisters as they direct, and if they do not direct, then according to the statute of distribution of Virginia, while under the U. S. Statute, if there is no widow, husband or children, it must go to the parents; again, under the state law, if there is no wife, husband, child, parent, brother or sister, the amount so recovered shall be assets in the hands of the personal representative to be disposed of according to law, while under the same

circumstances under the U. S. Statute it would go to the next of kin dependent upon such employee.

The judgments under these two remedies may not always be the same, but could be entirely different and at variance with each other; take for example the case at bar. Suppose that the intestate left neither wife nor child, but did leave parents, brothers and sisters, under the state law the jury would have a right to direct in what proportion the recovery would go to each, and failing to direct, it would go according to the statute of distribution, both of which could be entirely different from the disposition to be made of the recovery under the U. S. Statute where it would necessarily go to the parents. In this very case, if there was neither wife, child or parents, under the Virginia law it would go to the brothers and sisters, but under the U. S. Statute to the next of kin dependent upon such employee. Other instances of difference in the judgment could be cited to show that the two remedies cannot be joined in the same action, for where the judgment may be different under the different counts, there is a mis-joinder. 4 Minor's Inst. 2nd Ed. p. 398. Under the circumstances last above stated, if the court was called upon to instruct the jury as to the distribution of the fund in case of recovery how could they be so instructed? If it did so under the first four counts based on the Virginia law it would go to the brothers and sisters, and the next of kin dependent on such employee, if other than brothers or sisters, would have just cause of complaint. Suppose again that there was no instruction on this point and the judgment was simply in favor of the personal representative, how would he distribute it? It would be his duty to ask the advice of the court. How would the court advise him, whether he should distribute the recovery under the U. S. Statute or according to the law of the state, as the court could not be advised under the general verdict of the jury whether the finding was based upon the one or the other set of laws.

But is not the answer to the foregoing seemingly anomalous situation to be found in the solution of this question "Can a condition arise, as is set forth in this declaration, where an injury can be said to have occurred partly intra-state and partly interstate?" Is it possible for a train to be intra-state and interstate at one and the same time? Does not the proof that it was interstate preclude it from being any longer considered intra-state? Are not the allegations contained in the 5th and 6th counts at variance and contradictory to those contained in the first four? The questions referred to herein are only few of the many interesting and novel ones which have occurred to me in the consideration of this declaration and the demurrer.

Suppose upon the trial of a case, based upon a declaration

complaining of negligence generally, without averring the defendant was engaged in interstate commerce, the defendant should show by the evidence that the train upon which the plaintiff or his intestate was injured was doing inter-state commerce business, how far would a demurrer to the evidence lie, based solely on the ground that being engaged in inter-state commerce the U. S. Statutes on the subject are exclusively of state authority?

I am, therefore, of the opinion, that the 5th and 6th counts of the declaration charging liability upon the defendant under the U. S. Statutes, standing alone, would allege a liability upon the defendant in favor of the plaintiff and that the demurrer to these two counts, if in a separate action, should be overruled, but that the general demurrer to the declaration should be sustained because of misjoinder and the plaintiff be given leave to amend his declaration by electing under which remedy he will proceed whether under the first four counts based upon the state law or under the last two based upon the U. S. Statutes and striking from the declaration those counts upon which he does not elect to proceed. It is, therefore, ordered that this suit be remanded to rules with leave to the plaintiff to amend his declaration as he may be advised.

*Note. See Editorial, post, p. 314.

SUPREME COURT OF APPEALS OF VIRGINIA.

COLES' HEIRS *et al. v.* JAMERSON.

June 8, 1911.

[71 S. E. 618.]

1. **Taxation (§ 734*)—Tax Titles—Deeds—Statute.**—The owner of land, who lived in another county, died, leaving a will devising it to be sold, and the will was not probated in the county where the land was located, so the records did not furnish the information contemplated by Code 1904, §§ 459, 460, and this information was not furnished by the parties in interest, as provided by section 463. The lands were assessed in the name of the owner, instead of to his estate, as required by section 474. Code 1904, § 473, declares that land correctly charged to one person shall not afterwards be charged to another, without evidence of record that such change is proper; and section 661 provides that the holder of a tax deed has the right or title, which was vested in the party assessed with the taxes, or in one claiming under him. Held, that a sale of these lands for de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.